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3 **UNITED STATES DISTRICT COURT**
4 **NORTHERN DISTRICT OF CALIFORNIA**
5 **SAN JOSE DIVISION**
6

7 NETGEAR, INC.,
8 Plaintiff,

9 v.

10 REDZONE WIRELESS, LLC,
11 Defendant.

Case No. [16-cv-06974-BLF](#)

**ORDER GRANTING DEFENDANT'S
MOTION TO QUASH COMPLAINT
FOR IMPROPER SERVICE AND
TERMINATING MOTIONS**

[Re: ECF 10]

12
13 Redzone Wireless LLC (“Redzone”), a Maine corporation, moves to quash the complaint
14 in this declaratory judgment action for improper service. *See generally* Mot. Netgear, Inc.
15 (“Netgear”), a California corporation, opposes the motion. *See generally* Opp’n, ECF 19. The
16 Court heard argument on this motion and on Redzone’s pending motion to dismiss on April 6,
17 2017. For the reasons discussed herein, the Court GRANTS Redzone’s motion to quash service
18 and TERMINATES the motion to dismiss WITHOUT PREJUDICE.

19 The Court lacks jurisdiction over defendants who have not been properly served. *SEC v.*
20 *Ross*, 504 F.3d 1130, 1138–39 (9th Cir. 2007). Accordingly, Federal Rules of Civil Procedure
21 12(b)(4) and 12(b)(5) permit a court to dismiss an action for insufficiency of service of process.
22 Fed. R. Civ. P. 12(b)(4)–(5). Rule 12(b)(4) enables the defendant to challenge the substance and
23 form of the summons, and 12(b)(5) allows the defendant to attack the manner in which service
24 was, or was not, attempted. When the validity of service is contested, the burden is on the plaintiff
25 to prove that service was valid under Rule 4. *Brockmeyer v. May*, 383 F.3d 798, 801 (9th Cir.
26 2004). If the plaintiff is unable to satisfy this burden, the Court has the discretion to either dismiss
27 the action or retain the action and quash the service of process. *Lowenthal v. Quicklegal, Inc.*, No.
28 16-cv-3237, 2016 WL 5462499, at *14 (N.D. Cal. Sept. 28, 2016). “Dismissals for defects in the

1 form of summons are generally disfavored.” *U.S.A. Nutrasource, Inc. v. CNA Ins. Co.*, 140 F.
2 Supp. 2d 1049, 1052 (N.D. Cal. 2001).

3 On November 4, 2016, Netgear, through a process server, attempted to serve Redzone at
4 91 Camden Street, #300, Rockland, Maine. Mot. 2, ECF 10; Ex. B to Mathur Decl. ISO Opp’n to
5 Mot. Quash (“Proof of Service”), ECF 19-3. The parties agree that the process server handed a
6 copy of the summons and complaint in this action to Jimmy Hannan, a Redzone employee. Mot.
7 2; Opp’n 2.

8 Under Federal Rule of Civil Procedure 4(h), Netgear may demonstrate that service was
9 proper under either California or Maine law, or pursuant to Federal Rule (4)(h)(1)(B). Fed. R.
10 Civ. P. 4(h) (allowing a plaintiff to serve corporation in a judicial district of the United States in
11 the manner prescribed by Rule 4(e)(1) for serving an individual or “by delivering a copy of the
12 summons and of the complaint to an officer, a managing or general agent, or any other agent
13 authorized by appointment or by law to receive service of process and—if the agent is one
14 authorized by statute and the statute so requires—by also mailing a copy of each to the
15 defendant”). The latter is inapplicable, as neither party contends that Mr. Hannan was an “officer,
16 a managing or general agent, or any other agent authorized by appointment or by law to receive
17 service of process” on behalf of Redzone. Thus, for service to be proper, it must have complied
18 with either California or Maine law.

19 Under the California Code of Civil Procedure, a summons may be served on a corporation
20 by delivering a copy of the summons and the complaint to (1) “the person designated as agent for
21 service of process as provided by any provision in Section 202, 1502, 2105, or 2107 of the
22 Corporations Code”; or (2) “the president, chief executive officer, or other head of the corporation,
23 a vice president, a secretary or assistant secretary, a treasurer or assistant treasurer, a controller or
24 chief financial officer, a general manager, or a person authorized by the corporation to receive
25 service of process.” Cal. Civ. Proc. Code § 416.10. Redzone argues that the person to whom
26 service was delivered here, Mr. Hannan, is not one of the persons identified in section 416.10 as
27 able to accept service. Mot. 4. Netgear does not contest this assertion. Accordingly, the Court
28 deems this argument conceded.

1 In relevant part, Maine Rule of Civil Procedure 4(d)(8) provides that service may be
2 effected upon a domestic private corporation:

3 by delivering a copy of the summons and of the complaint to any
4 officer, director or general agent; *or, if no such officer or agent be*
5 *found*, to any person in the actual employment of the corporation; or,
6 if no such person be found, then pursuant to subdivision (g) of this
Rule, provided that the plaintiff's attorney shall also send a copy of
the summons and of the complaint to the corporation by registered
or certified mail, addressed to the corporation's principal office as
reported on its latest annual return

7 Me. R. Civ. P. 4(d)(8) (emphasis added). Redzone contends that Netgear's process server did not
8 comply with Rule 4(d)(8) because the proof of service makes no mention of any attempts to locate
9 and serve any officer, director, or general agent of Redzone before serving Mr. Hannan, an
10 employee. Reply ISO Mot. 2, ECF 24. Moreover, Redzone argues that Netgear has submitted no
11 declaration stating that anyone made a search for or could not locate any such officer, director, or
12 general agent, before serving Mr. Hannan. *Id.* Perhaps recognizing this, Netgear emphasizes only
13 that Maine law allows for service upon an employee. *See* Opp'n 3–4. Netgear, however, ignores
14 the condition precedent found in Rule 4(d)(8): “if no such officer or agent be found.” Having
15 failed to satisfy the condition precedent through declaration or affidavit, the Court cannot agree
16 that service complied with Maine law.

17 Moreover, the Court does not agree with Netgear's contention that the Court can
18 “overlook” this technical defect in service because Redzone received actual notice of the lawsuit.
19 Opp'n 4. In its papers, Netgear relies upon *Phillips v. Johnson*, 834 A.2d 938 (Me. 2003), and *In*
20 *re Richard E.*, 978 A.2d 217 (Me. 2009). Neither case is persuasive, however, because in both of
21 those cases, the court had previously granted the plaintiffs' motions for service by publication.
22 *Phillips*, 834 A.2d at 945; *In re Richard E.*, 978 A.2d at 221. Thus, the court found that actual
23 notice was sufficient despite the plaintiff's failure to comply with service requirements because
24 the trial court had allowed for alternative service. Actual notice was the inquiry because, under
25 Maine Rule of Civil Procedure 4(g)(1)(C), the method and manner of alternative service must be
26 “reasonably calculated to provide actual notice.” Me. R. Civ. P. 4(g)(1)(C). Here, the Court has
27 not allowed Netgear to serve Redzone through alternative means, and Netgear has not moved for
28 such relief. Thus, the inquiry is whether Netgear has complied with the service requirements

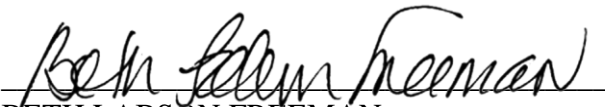
1 under Maine rules. It has not. Accordingly, the Court will GRANT Redzone's motion to quash
2 service under Rule 12(b)(5).

3 The Court will nevertheless allow Netgear the opportunity to cure the service error by
4 affording Plaintiff an extension of the 90-day service deadline set forth in Fed. R. Civ. P. 4(m).
5 *Efaw v. Williams*, 473 F.3d 1038, 1041 (9th Cir. 2007) (holding that courts have broad discretion
6 to extend the time for service under Rule 4(m)); *see also Henderson v. United States*, 517 U.S.
7 654, 661 (1996) (the service period contained in Rule 4(m) "operates not as an outer limit subject
8 to reduction, but as an irreducible allowance"); *Mann v. Am. Airline*, 324 F.3d 1088, 1090 (9th
9 Cir. 2003) ("Rule 4(m) explicitly permits a district court to grant an extension of time to serve the
10 complaint[.]"). Netgear shall file a proof of service with the Court **on or before May 15, 2017**.
11 Failure to file a valid proof of service shall result in issuance of an order to show cause.

12 Also pending before the Court is Redzone's motion to dismiss the complaint pursuant to
13 Federal Rule of Civil Procedure 12(b)(2). ECF 9. Because the Court grants Redzone's motion to
14 quash service of the summons, the Court TERMINATES Redzone's motion to dismiss
15 WITHOUT PREJUDICE. Redzone may re-notice the motion with the Court, if necessary, once
16 service has been properly effected. If Redzone chooses to re-notice the motion, the parties shall
17 stand on their briefing already submitted to the Court.

18 **IT IS SO ORDERED.**

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20 Dated: April 17, 2017

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22 BETH LABSON FREEMAN
23 United States District Judge
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